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MICHAEL RODAK, JR

No. 73-1187

In the Supreme Court of the United States

OCTOBER TERM, 1973

ROBERT L. PARKMAN, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 488 F.2d 1392.

JURISDICTION

The petition for a writ of certiorari was filed on Feb- on November 15, 1973 (Pet. App. B). A petition for rehearing was denied on January 4, 1974 (Pet. App. C). The petition for a writ of certiorari was filed on February 4, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether multiple conspiracies were charged requiring the district court to grant a severance or a new trial.

2. Whether the district court erred in its interpretation of documents requested by the jury.

3. Whether the district court was correct in not declaring a mistrial when the jury initially indicated its inability to reach a verdict.

4. Whether the district court erred in denying a motion for a bill of particulars.

5. Whether the district court erred in denying a motion for a mistrial based on the alleged knowing use of perjured testimony.

6. Whether the district court erred in denying motions for a new trial based on alleged unfair tactics of the government.

7. Whether the district court erred in refusing to treat testimony of a witness at a former trial as Jencks Act material.

8. Whether the district judge's interview of the jury foreman, to determine whether his distant kinship to one of the defendants would require him to be excused, was prejudicial.

9. Whether the district court erred in refusing to dismiss the case because of alleged prejudicial delay in prosecuting the case.

STATEMENT

Following a jury trial in the United States District Court for the Western District of Louisiana, peti-

tioner was convicted on eighteen counts of mail fraud, in violation of 18 U.S.C. 1341.[1] He was sentenced to eighteen months' imprisonment on each count, to run concurrently, and a $500 fine on each count. Execution of the sentence was suspended and petitioner was placed on three years' probation. The court of appeals affirmed *per curiam* (Pet. App. A).

In November 1965, Kenneth DeMary was approached by a friend, Mayo "Pancho" Perez, with the suggestion of making money by staging automobile collisions and filing fraudulent insurance claims for purported physical injuries (Tr. 1460). DeMary was acquainted with several attorneys in the Bossier-Shreveport area of Louisiana and was confident that he could arrange, not only for someone to drive a "hitter" vehicle, but also for attorneys to handle their claims (Tr 1460).

Commencing with a collision in November 1965, and continuing until approximately September 1966, DeMary and his brother were instrumental in arranging approximately twenty-five different automobile collisions throughout the Western District of Louisiana[2] (Tr. 1470). All of the collisions were clear liability

[1] Petitioner was one of 14 defendants named in a 40-count indictment charging all defendants with one count of conspiracy and various defendants with 39 counts of mail fraud. Eleven defendants were severed and tried separately. Of petitioner's two remaining co-defendants, one was acquitted completely and the other was convicted of all charges. Petitioner was acquitted of conspiracy.

[2] The instant indictment enumerated fourteen specific fraudulent collisions which occurred in various locations throughout the Western District of Louisiana.

cases. Attempts were made to stage the collision in a secluded area where the culpable driver of the "hitter" vehicle would either fail to yield the right of way or run through a stop sign and strike the rear of the target vehicle (Tr. 1545). Following the collision, the guest passengers were referred to various attorneys for processing of the personal injury claims with the insurance companies involved. The attorneys, who had been advised by the DeMarys of the fraudulent nature of the claims, would arrange for cash advances for each of the claimants.

Kenneth DeMary first met petitioner in approximately 1963. In 1965, in addition to practicing medicine, petitioner was part-owner of a recording studio in the Bossier, Louisiana, area, together with Henri Loridans, one of the attorneys who knowingly handled many of the fraudulent claims referred to him by the DeMarys[3] (Tr. 1521–1522). At the time, Kenneth DeMary was engaged in scheduling recordings for various bands and consequently frequented petitioner's studio on several occasions. Shortly after the inception of the scheme, Kenneth DeMary approached petitioner and asked if he would handle some of the collisions. Petitioner agreed to participate and handle "* * * anything we would give him up in that area in North Louisiana" (Tr. 1514, 1517).

During the course of petitioner's participation in the scheme, DeMary would occasionally contact him even prior to the collision to alert him and discuss the

[3] Loridans was convicted in the Eastern District of Louisiana for his part in the scheme.

feasibility of hospitalizing the intended "patients" (Tr. 1524). Moreover, DeMary was a frequent visitor to petitioner's office, where they discussed various "patients" being treated by petitioner; DeMary occasionally obtained from him medical reports for the attorney-participants (*ibid.*).

In those instances where the claimant resided in the Bossier-Shreveport area, they were referred by Kenneth DeMary, or one of his confederates, to petitioner for "medical treatment." Petitioner and the DeMarys made a maximum effort to get the "patient" to petitioner's office on at least one occasion. This insured that petitioner's records and reports to the insurance carriers reflected a credible medical history and physical description of the patient. Nevertheless, the testimony of Kenneth DeMary, Randle Meek and Rosemary Clark established that on at least two occasions petitioner provided medical reports and bills without ever seeing the patients.

The reports and bills prepared and submitted by petitioner were proved at trial to be false in many respects. Aside from the fact that they were knowingly predicated on false injuries sustained in staged collisions, the testimony of numerous witnesses established that they reflected charges for "treatments" never rendered, injections never administered and office visits never made.

In connection with his testimony, petitioner produced his patient records, which he contended substantially comported with the bills he caused to be submitted to the insurance companies. The testimony

adduced concerning these records strongly suggested that petitioner had altered them. The treatment dates listed in chronological order generally agreed with the recollection of the witnesses as to the number of times they actually saw petitioner. In many instances, however, listed in the right-hand margin was an additional series of treatment dates. These later entries were made with a different pen and were identified as being written by petitioner (Tr. 2150). When all the treatment dates, both those listed in chronological order and the subsequent ones in the margins, were added together, they generally agreed with the number of treatments reflected on the bills transmitted to the carriers.[4]

ARGUMENT

1. Petitioner's contention that the court erred in not granting a severance or a new trial because multiple conspiracies were charged is without merit.

The scheme to defraud in which petitioner was involved was a unitary on . It involved the staging of a succession of automobile collisions, coordinated by two individuals, the DeMary brothers. Central to this scheme was the employment of attorneys and physicians to certify and process the fraudulent claims. When petitioner joined in the common scheme as one of the physicians, he was fully apprised that it was of an ongoing nature and involved numerous false collisions. See *Blumenthal* v. *United States*, 332 U.S.

[4] Petitioner stipulated to the use of the mail, thus obviating the need for the government to prove through its witnesses the actual uses of the mails charged in the indictment (Tr. 1300–1301).

539, 550. The court thus did not abuse its discretion in refusing to grant petitioner's motion for a severance or a new trial.

Nor is there any merit to petitioner's contention that, since he was found not guilty of the conspiracy charge, he therefore could not be guilty on any of the substantive counts. An acquittal for conspiracy does not preclude a conviction for the substantive offense, see *United States* v. *Tierney*, 424 F.2d 643, 645 (C.A. 9), certiorari denied, 400 U.S. 850; *United States* v. *Cole*, 449 F.2d 194, 201, n. 4 (C.A. 8), certiorari denied *sub nom. Woodward* v. *United States*, 405 U.S. 931. Moreover, consistency in verdicts is not necessary. See *United States* v. *Mills*, 456 F.2d 1111, 1112 (C.A. 6), certiorari denied, 406 U.S. 960; *Lowther* v. *United States*, 455 F.2d 657, 663 (C.A. 10); *United States* v. *Carbone*, 378 F.2d 420 (C.A. 2), certiorari denied, 389 U.S. 914.

Petitioner's contention that, in effect, the conspiracy acquittal retroactively invalidated the admission of hearsay statement of co-conspirators is insubstantial. Hearsay statements of co-conspirators are admissible against a defendant if his participation in the conspiracy is shown by a fair preponderance of other evidence. See *United States* v. *Bey*, 437 F. 2d 188, 190–192 (C.A. 3); *United States* v. *Geaney*, 417 F. 2d 1116, 1120 (C.A. 2), certiorari denied *sub nom. Lynch* v. *United States*, 397 U.S. 1028. Such was the case here.

2. Petitioner's contention that the district court erred in interpreting the jury request for medical

reports is without merit. After the case had been submitted to the jury, the jury requested that they be allowed to inspect all of the petitioner's reports submitted to the insurance companies.[5] The district court judge thereupon sent to the jury all the bills on petitioner's stationary that were sent to the insurance company and twenty-eight patient records of petitioner. All these items had been introduced into evidence.

Petitioner contends that this was error because he did not send any of these bills directly to the insurance company, but rather to co-defendant Payton Covington, who then sent them to the insurance company. The claim is insubstantial. The request of the jury was not for bills sent directly by petitioner, but rather for bills submitted to the insurance companies by petitioner.

Nor could the jury have been misled into believing that petitioner sent the records directly to the insurance companies. All the bills reflected on their face the fact that they had been sent by petitioner to attorneys.

3. Petitioner's contention that the court erred in not declaring a mistrial is insubstantial. Following the trial, which lasted almost a month, the jury deliberated for three days before reaching a verdict, beginning at 11:50 a.m. on the first day and reaching a

[5] "Please furnish (1) patient's records, and (2) bills to insurance companies submitted by Doctor Parkman" (Tr. 2871).

verdict at 11:58 a.m. on the third day. On several occasions during this period they indicated that they could not reach a verdict. In response, the district court judge directed the jury to continue their deliberations.

Whether a jury should continue to deliberate after they have indicated that they are deadlocked is a matter within the discretion of the court. See *United States* v. *Pope*, 415 F. 2d 685, 690 (C.A. 8), certiorari denied, 397 U.S. 950. Here, there was no showing of abuse of that discretion, see *DeVault* v. *United States*, 338 F. 2d 178, 182 (C.A. 10); hence there was no occasion for permitting an examination of the jury following their verdict. See *Dickinson* v. *United States*, 421 F. 2d 630, 632 (C.A. 5); *United States* v. *Allied Stevedoring Corp.*, 258 F. 2d 104, 105–106 (C.A. 2).

4. Petitioner also contends that the court erroneously denied his requests for a bill of particulars and for production of records. Seven months before trial, petitioner was given all the materials and documents which the government intended to introduce at trial. The purpose of a bill of particulars is to place the defendant on notice of the charges and to allow him effectively to prepare his defense, thus avoiding surprise at trial. *Wong Tai* v. *United States*, 273 U.S. 77, 82. No showing of surprise or other prejudice has been made here, and, as no clarification of issues or nature of offenses was sought, there was no abuse of discretion in denying petitioner's motion. See *Duncan*

v. *United States,* 392 F. 2d 539, 541 (C.A. 9), certiorari denied, 391 U.S. 935.

5. Petitioner contends further that his motion for a new trial, based upon alleged knowing use by the government of perjured testimony, was improperly denied. The record does not reflect perjury on the part of witness Kenneth DeMary, nor any effort by the government to elicit perjury. Any discrepancy between his prior testimony and that in this case was fully explored on cross-examination and argued thereafter to the jury.[6] Here, as in *United States* v. *Hamilton,* 452 F. 2d 472, 476 (C.A. 8), "[petitioner's] counsel has not directed [the Court's] attention to any direct evidence of the procurement by the prosecution, or for that matter by any other person, of perjured testimony."

6. Petitioner's contention that the district court erred in denying his motion for a new trial, because the government had suggested that petitioner did not pay the proper income tax and that he fabricated evidence, is insubstantial.

During petitioner's direct examination, his attorney

[6] DeMary testified in a prior trial that he had not at that particular time spoken with petitioner at a recording studio (Tr. 58–61); he did not testify that no such conversation had ever taken place. In this case, when asked about a specific automobile collision, he testified that he had made prior arrangements with petitioner, during a conversation at the recording studio, for a fraudulent medical examination (Tr. 1513–1514, 1517). It is in no way evident that the same collisions were under discussion in each case, or that the government specifically sought, in the instant case, to elicit the testimony from DeMary that he talked to petitioner at a recording studio.

questioned him extensively on his gross receipts as reflected by income tax returns. It was petitioner's intention to show that because of his large income, he would have no motivation for engaging in the fraud he was charged with (Tr. 2107, 2031–2042). On cross-examination the government sought to establish, using the same tax returns, that there was a significant disparity between petitioner's gross receipts and his net reported income. Thus it was petitioner, not the government, who raised the issue of his income tax returns.

In regard to the suggestion that petitioner falsified his medical records, the evidence strongly supported the inference that his medical records were altered by petitioner to comport with the records sent to the insurance company. This fabrication of evidence was properly exposed, as it bore on petitioner's guilty knowledge. See *United States* v. *Wilkins,* 385 F.2d 465, 472 (C.A. 4).

Moreover, petitioner failed to raise either of these two points in his motion for a new trial. Therefore, the district court could not have possibly erred in failing to grant a new trial on this basis.

7. It is further contended that the testimony of various witneses given in another related trial, in another jurisdiction, should have been disclosed before trial under the Jencks Act, 18 U.S.C. 3500. But that statute, which makes various materials available only after a witness has testified on direct examination, was aimed at compelling production of those statements "in the possession of the United States." The

testimony at issue here was of public record and no more available to the government attorney than to defense counsel. Nevertheless, the United States Attorney offered to make his copy of the 5,600 page New Orleans transcript available for inspection and duplication prior to trial; the offer was not accepted.

8. Petitioner further contends that the procedure used in the interview of the jury foreman had the prejudicial effect of pressuring him to adopt a pro-government stance. The foreman was summoned to the district judge's chambers for a private interview to determine whether his distant kinship to a defendant would require the foreman to be excused. This interview was conducted with the consent of the defense counsel, and there is no evidence to indicate that it had any prejudicial effect.

9. Finally, petitioner complains of a prejudicial delay in prosecution. The indictment, returned June 26, 1969, was well within the five-year statute of limitations. Following disposition of voluminous pretrial motions, the case was assigned on October 17, 1970, and set for trial on August 9, 1971. When it was learned that the transcripts in the companion case in New Orleans had not yet been completed, all parties agreed to a continuance until January 17, 1972. A continuance of seven days, requested by petitioner after dismissal of one of his five attorneys, delayed the start of trial to January 26, 1972. Petitioner at no time requested an earlier trial and has alleged no prejudice to his own case as a result. The absence of any prejudice, the failure to request an earlier trial,

and the fact the delay was not attributable to the government obviates the claim of denial of Sixth Amendment rights. See *Barker v. Wingo*, 407 U.S. 514, 517; *United States* v. *Marion*, 404 U.S. 307, 313.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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